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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-81.

Supreme Court, U. S.
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UNITED STATES OF AMERICA,

Petitioner,

—v.—

LOARN ANTHONY BISWELL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus Curiae**

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 170,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights. One of the most vital of those civil liberties is the right of privacy premised on the Fourth Amendment and reinforced by other Amendments as well. The central question in this case is whether and in what respect that right of privacy is infringed by a congressional statute which authorizes warrantless searches of the premises of certain

* Letters of consent to the filing of this brief, from counsel for the petitioner and the respondent, have been filed with the Clerk.

classes of people. We provided counsel for the appellants in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967), and we hope that our experiences in connection with those cases will be of assistance to the Court.

I.

Introduction and summary of argument.

The issue in this case arises from the Government's attempt, relying on 18 U.S.C. Section 923(g), to avoid application of the Fourth Amendment warrant requirement to persons licensed to manufacture, sell or collect certain firearms. Its resolution turns on two related questions: (1) whether the statute authorizing warrantless administrative searches without probable cause and without any specified rules governing the procedure that inspectors must follow is consistent with the Fourth Amendment, and (2) whether evidence found during such a warrantless search may constitutionally be utilized to convict the Respondent.

If held not to require a search warrant for inspection, then the statute removes the home of the gun collector, as well as the business premises of the gun seller, from the protection of privacy guaranteed by the Fourth Amendment. The consequence, as noted by Mr. Justice Douglas, is that the right to be free from arbitrary intrusion by the government " . . . is watered down to embrace only certain invasions of one's privacy. If officials come to inspect . . . they may come without a warrant and demand entry as of right. This is a strange deletion to make from the Fourth Amendment." *Frank* v. *Maryland,* 359 U.S. 360, 375 (1959) (dissenting opinion). By permitting the warrantless entry of an

official to demand records and documents, and to inspect for firearms which may result in conviction, the statute resembles the hated Writs of Assistance which were attacked by James Otis as placing the "liberty of every man in the hands of every petty officer." Tudor, *Life of James Otis,* 66 (1823) (quoted in *Frank* v. *Maryland, supra* at 364). Such provisions helped spark the American Revolution and led directly to the passage of the Fourth Amendment. See Lasson, *The History and Development of the Fourth Amendment,* c. 2 (1937); Davis, *The Administrative Power of Investigation,* 56 Yale L.J. 1111, 1154 (1947).

The warrantless searches purportedly authorized by this statute infringe upon two discrete Fourth Amendment interests. The first is the basic intrusion into the inspectee's privacy, an interest described in *Frank* v. *Maryland, supra,* as "... . the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the State unless their entry is under proper authority of law." *Id.* at 364. The government attempts to justify this intrusion by pointing to the public interest in prompt inspection of the premises of gun dealers as outweighing the "minimal" intrusion. But warrantless searches are never preferred, particularly where, as here, several alternative methods within the framework of a warrant procedure are available to achieve the statutory objectives.

Second, and equally objectionable, the statute violates the self-protection interest of the inspectee. Information gathered during the invasion of the privacy interest can then be used, as here, to "effect a further deprivation of life or liberty or property," *Frank* v. *Maryland, supra* at 365, forfeiture of property and a conviction for possession

of improper weapons. At the very least, and assuming *arguendo* that the invasion of the privacy interest without a warrant is held necessary to effecting the statutory objectives, then the licensee's self-protection interest must be preserved intact by denying to the Government any prosecutorial fruits of its warrantless search. If the statute is allowed to sacrifice both sets of interests, then, in effect, it supplants the Fourth (and Fifth) Amendments.

II.

The warrantless inspection provisions of 18 U.S.C. Section 923(g) significantly invade the Fourth Amendment privacy interests of the class of inspectees covered by the statute; since less drastic alternatives are available to accomplish the statutory objectives (within the framework of a warrant procedure) such inspections are unconstitutional.

This is another in the series of administrative inspection cases which have come before this Court in recent years and are the inevitable concomitant of industrial development, urbanization and advancing technology. Of course, there can be no quarrel with this country's need for "effective gun control" through a licensing system, nor with the obvious need for inspection of the licensees to insure the basic statutory purpose of regulating and tracing firearms. But, as in the earlier cases, "the question is not . . . whether these inspections may be made, but whether they may be made without a warrant." *Camara* v. *Municipal Court*, 387 U.S. 523, 533 (1967).

A. The relevance of the *Colonnade* case.

In *Colonnade Catering Corporation* v. *United States*, 397 U.S. 72 (1970) this Court addressed itself to a similar statutory arrangement. That decision is relevant here in two respects. First, it affords the basis for deciding this case on a narrow ground. There this Court held that where Congress had chosen the alternative of making it an offense for a licensee to refuse admission to the inspector, then a warrantless, forcible entry was unauthorized by the statute and therefore improper. Similarly, here the refusal to permit an inspection would constitute a crime under 18 U.S.C. Section 924(a) and would result in revocation of the license in question under 18 U.S.C. Section 923(e) and (f), Brief of Petitioner, p. 9, n. 4. In short,

> . . . Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector. 397 U.S. at 77.

Second, while the decision referred to Congress' "broad power" to design inspection powers under the liquor laws, the Court also stated that "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Ibid.*

The Government attempts to characterize this statute as solely a "licensing scheme" directed at business enterprises, and therefore not subject to the warrant requirement. But significantly, 18 U.S.C. Section 923(g) authorizes inspections not into "businesses" but "premises" and includes the "collector" as well as the manufacturer and dealer.

Thus the private citizen at home, licensed to collect firearms as a hobby, is, under the Government's view of this case, subject to the same warrantless intrusion into his premises as the businessman, and the warrantless inspections sought to be justified sweep further than businessmen as a class.[1] In *See* v. *City of Seattle*, 387 U.S. 541 (1967), this Court held that no distinction exists between the Fourth Amendment requirements applicable to administrative searches of commercial and private premises, a search of either "is presumptively unreasonable if conducted without a warrant." Accordingly, since the statute here applies to other than commercial premises, any argument that the present situation is somehow like the commercial licensing scheme in *Colonnade*, and therefore outside the framework of the general rule in *See* v. *City of Seattle, supra*, is misplaced.

In short, the fact that private, non-commercial premises are included within the sweep of the warrantless searches here sought to be sustained requires that the case be decided under the principles of *See* and *Camara*.

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[1] And although 923(g) authorizes *entry* only during "business hours", that section also requires licensees to make records available for inspection "at all reasonable times". No extended discussion is necessary to show the possibility for abuse when one considers applying this statute to the gun collector who keeps his collection at home. "Business hours" may be incapable of definition and "reasonable times" might be deemed to include nighttime visits. These problems necessitate that a magistrate be interposed between inspector and licensee. These problems leave, e.g., the gun collector living at home "subject to the discretion of the official in the field". This is precisely the discretion to invade private property which this Court has "consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Camara* v. *Municipal Court, supra*, 532-3 "Broad statutory safeguards are no substitute for individualized review". (*Id.*, at 533).

B. The Government has shown no necessity for the warrantless searches.

Since, under *See* and *Camara,* a warrantless search of the kind conducted here "is presumptively invalid," it is necessary to examine the Government's reasons for justifying such a procedure and to consider whether what the Government seeks to accomplish outside the warrant procedure could be accomplished within it.

The Government's first objection to the warrant requirement is that if the inspector must ask the licensee for permission to enter without a warrant and then seek a warrant only if refused, the crucial element of surprise is eliminated since "The dealer who is skirting the law would almost surely utilize the time thereby afforded to conceal any infractions" (Government Brief, p. 16). This conclusion is not disputed but the argument begins from a false premise, since there is absolutely no requirement that the inspector make this pre-warrant request. The "suggestion" in *Camara,* that "it seems likely that warrants should normally be sought only after entry is refused," 387 U.S. 523 at 539, was made only because the kinds of violations sought to be revealed could not be moved or covered up. Where firearms are concerned a request to inspect need not be a pre-condition for obtaining a warrant, and surprise can continue to play a factor, as it should, even though a warrant is obtained. Thus, the question of "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" *Camara* v. *Municipal Court, supra,* at 533 should be answered in the negative. And without the need for a demand for entry as a precondition for obtaining a warrant, the warrant require-

ment itself will in no way be "likely to frustrate the governmental purpose behind the search." *Ibid.*

The Government's other objections to the use of a warrant procedure under 18 U.S.C. 923(g) are that (1) an "automatic warrant requirement" would result . . . "even though most licensees would have no objection to inspection," causing (2) a "needless consumption of limited" enforcement manpower in turn somehow resulting in (3) "a tendency to antagonize the law abiding dealers" (Government Brief, p. 16).

The Government's speculative claim that most licensees would cheerfully submit to inspection without the necessity of a warrant surely begs the question whether the warrant should be required and disregards the interests of those who would assert their Fourth Amendment rights. If the right to demand a warrant exists, it should not be withdrawn merely because some choose not to exercise it. Indeed, it may be precisely because the licensee knows of his right to insist upon a warrant that he does not do so. The willingness of some citizens to waive certain Constitutional rights cannot be the basis for withholding those rights from all.[2]

Next, the Government claims that a warrant requirement would needlessly consume the manpower of agents in the Alcohol, Tobacco and Firearms Division. Such a contention is at odds with the doctrine consistently adopted by

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[2] For example, as Mr. Chief Justice Burger has noted, if every felony defendant in this country exercised his right to a jury trial, the strain on judicial resources would be enormous. See *Santobello* v. *New York*, ——U.S.——, 40 USLW 4076, 4077 (1971). Yet the fact that over 90 percent of all defendants waive such rights has never been urged as a basis for doing away with the Sixth Amendment.

this Court that the warrant requirement of the Fourth Amendment

> . . . is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a part of any system of law enforcement. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 29 L. Ed.2d 564, 592 (1971).

"Expediting" the work of the particular governmental agency which sees itself as somehow hampered by the warrant requirement has never been allowed as a basis for abolishing the requirement. If it were, the claim of expediency would doubtless always win, since it "appears over and again whenever government seeks to use its compulsive force against the citizen," *Frank* v. *Maryland, supra,* at 382 (dissenting opinion), "The official's measure of his own need often does not square with the Bill of Rights". *Ibid.* The Government's argument based on inconvenience is nothing more than a claim that the warrant requirement should cease to exist because one must obtain a warrant in order to meet that requirement.[3]

Finally, the Government speculates that imposing a warrant requirement would somehow result in a "tendency to antagonize the law abiding dealers" (Government Brief,

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[3] The Government's claimed "lack of adequate manpower" may also be the result of the IRS' own misconception that no warrants would be necessary for the inspections which it wished its agents to conduct. The better solution would be to request more agents, not to allow a budgetary mistake to serve as a basis for dispensing with the Fourth Amendment.

p. 16). It is unclear just how such antagonism would be caused since the alternative is making the same inspection request and entering without a warrant and would involve, as in this case, reading a copy of the statute (18 U.S.C. Section 923(g)) to the licensee. If anything, the Government's supposedly law abiding dealer may wonder why no warrant is presented since he will, as did Respondent in this case (as well as the inspectees in *Frank, See, Camara* and *Colonnade*) share the average citizen's reasonable expectation that a warrant is required.

C. Requiring a warrant would significantly advance privacy interests.

In seeking to avoid the Fourth Amendment warrant requirements, the Government has also urged that a warrant requirement for inspections pursuant to 18 U.S.C. 923(g) does nothing to protect the privacy interest of the licensee since "the Magistrate asked to issue a warrant authorizing inspection of a gun dealer's premises could do no more than is presently done by statute" (Government's Brief, p. 15). There are several respects in which this argument is incorrect.

First, although some restrictions are imposed by statute governing the time of day when a particular inspection may occur, there is no guarantee that the agent will not resort to frequent, or daily inspections, for harassment purposes, nor is there any evidentiary check on whether this has in fact occurred, such as would be guaranteed under a warrant procedure. And, presumably the Magistrate himself might question the reasonableness of the need for issuance of daily warrants.

The warrant procedure would also provide a means for recording the basis for the inspector's belief that the prem-

ises to be inspected were in fact those of someone licensed under 18 U.S.C. 923 and would protect, for example, against the pretext search, on the claim of "mistaken judgment by the inspector, of the premises of one whose license had expired and who no longer sold, manufactured or collected firearms. Requiring the inspector to reduce to writing the basis for even the simple claim that the person whose premises to be inspected is in fact presently licensed would eliminate such a possibility.

Next, a precise description of the premises to be searched would be recorded in the affidavit supporting the warrant, thus protecting the licensee (and neighbors or tenants) from an over-broad search of adjacent premises, and protecting the inspector from possible civil liability against claims of exceeding his authority in conducting an over-broad search.

Furthermore, since *entry* is authorized only during "business hours," and since there is no time of day when the premises of the private collector are open to the public, adding a magistrate to the decision-making process of how to interpret "business hours" in this situation would do much to eliminate potential misunderstanding between the inspector and the private gun collector licensee. Similarly, Section 923(g) also requires that all licensees "shall make such records available for *inspection* at all *reasonable* times, . . . " (emphasis added). Thus, what is a reasonable, non-business hour is a relevant question which a magistrate may better decide than an inspector. Additionally, because there is no specific authority for entry under this clause but only the requirement that the records be "made available" at reasonable, non-business, hours, the magistrate's warrant would presumably spell out the details of what the inspector

may and may not do by way of requiring that records be "made available" and go far to settle on the scene disputes between inspector and licensee about how to interpret this statutory language.

Finally, refusal to make such records available on demand at a reasonable time is punishable as a felony (18 U.S.C. 924). Assuming, for example, that the inspector demands that a collector produce such records at midnight under the claim that the licensee was not found at home during the daylight hours, the licensee's refusal to permit this late-night inspection thus becomes a felony on the decision of the inspector. Thus, the agent is given the unfettered discretion to turn an unreasonable late-hour inspection demand into the threat to the licensee of a felony prosecution and is empowered either to overwhelm the licensee with fear or arrest him for refusal to produce records. This is precisely the kind of situation which the Fourth Amendment sought to avoid:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. *It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.* The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime .... Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. *Frank* v. *Maryland, supra* at 380 (dissenting opinion) (emphasis added).

The foregoing situation obviously places not only the privacy, but also the "*liberty* of every man in the hands of every petty officer," *Frank* v. *Maryland, supra,* at 364, citing Tudor, *Life of James Otis* (1823), 66 (emphasis added). It should not and need not be condoned by this Court. The statutory purposes can and should be accomplished only within the framework of a warrant requirement.

III.

Assuming *arguendo* this Court interprets 18 U.S.C. Section 923(g) to authorize warrantless administrative searches and agrees to sanction invasion of the licensee's privacy interest, *amicus* urges that the licensee's self-protection interest, guaranteed under the Fourth and Fifth Amendments, must be preserved. Evidence found during such an inspection should not be admissible for any purpose; indeed, the theory in permitting warrantless administrative inspections has as its premise that nothing found during the search can be used to incriminate the inspectee.

Since evidence seized during the administrative inspection in this case was used to convict Respondent, it is obvious that, apart from the privacy interest problems discussed in Part II, *supra,* Respondent's interest in self-protection, guaranteed under the Fourth and Fifth Amendments[4] has been invaded without a warrant.

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[4] There is some dispute as to whether the self-protection interest is grounded in the inter-relationship of the Fourth and Fifth Amendments, as this Court first suggested in *Boyd* v. *United States,* 116 U.S. 616 (1886) and as later urged by Mr. Justice Frankfurter in *Frank* v. *Maryland, supra,* at 365, or grows out of the First, Fourth and Fifth Amendments which were believed to be "indeed

In distinguishing between privacy and self-protection, Mr. Justice Frankfurter also showed their interrelationship in the area of administrative searches and suggested that warrantless intrusion into the privacy interest is only permissible, if ever, on the condition that no attempt will be made to invade the self-protection interest:

> Since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action" which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the Fourth and Fifth Amendments are said not to be involved, but only the less intense right to be secure from intrusion into personal privacy. *Camara* v. *Municipal Court, supra,* at 530.

Put another way, the privacy interest invaded under administrative inspection and licensing programs has, as in *Frank,* been balanced against the need for the inspection and, on balance, attenuated, but only on the pre-condition that as more and more of the privacy interest is surrendered, the self-protection interest is further shielded and preserved. "Inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, . . . " was acceptable, *Frank* v. *Maryland, supra* at 367,

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closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience, human dignity and freedom as well' ", as suggested in the concurring opinion of Mr. Justice Douglas in *Frank* v. *Maryland, supra,* at 376, citing *Ullman* v. *U. S.,* 350 U.S. 422 (dissent) and *Feldman* v. *U. S.,* 322 U.S. 487 (dissent). Whatever the precise basis for the self-protection interest, it has been consistently recognized as separate and distinct from that of privacy. *Camara* v. *Municipal Court, supra,* at 530-532.

the privacy interest could be invaded, but only on condition that self-protection would be insured. In short, what is taken away from privacy is given to self-protection.[5]

Thus, there is a workable model for reconciling the various inspections and licensing programs which come before this Court, namely, the theory, suggested in *Frank*, that even where the needs of a particular administrative agency are found to justify an intrusion into the Fourth Amendment privacy interest, no evidence seen or obtained during the inspection should be admissible against the inspectee's self-protection interest. Unless this model is adopted, and self-protection is safeguarded under an *a priori* exclusionary rule, the legitimate needs for development of various administrative inspections will surely be outstripped by the abuse of "pretext" administrative searches to do police

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[5] The dissent in *Frank*, stating what later became the majority view in *Camara* v. *Municipal Court, supra,* and *See* v. *City of Seattle, supra,* agreed with the privacy/self-protection distinction but objected to the *Frank* majority's view that the privacy interest was of less significance than the self-protection. In the *Frank* dissent, Mr. Justice Douglas also disputed the majority's factual assertion that the administrative inspection involved did not lay the groundwork for criminal prosecution (at p. 375) and, believing that attenuating the privacy interest necessarily attenuated the self-protection interest, objected to dispensing with the warrant requirement (at 375). This, of course, became the majority's reason for overruling *Frank* in *Camara* v. *Municipal Court, supra,* where privacy and self-protection were given equal weight. And although the companion case of *See* v. *City of Seattle, supra,* reserved decision on the problems of "licensing programs", such as presented in the present case, stating that they would be resolved "on a case-by-case basis under the general Fourth Amendment standard of reasonableness" (at 546), this "case-by-case" resolution seems applicable only to the privacy interest issue. Presumably a licensing, as distinguished from an administrative inspection program, may justify greater invasions of the privacy interest; no license, however, should be conditioned upon the mandatory waiver of one's self-protection interest under *Frost* v. *Railroad Commission,* 271 U.S. 583 (1926) or (by implication) *Haynes* v. *United States,* 390 U.S. 85 (1968).

work. New and broadly worded administrative programs designed to do indirectly what the police must now obtain a warrant to accomplish, will also undoubtedly develop;

> History shows that all officers tend to be officious; and . . . inspectors, making out a case for criminal prosecution of the citizen, are no exception, *Frank* v. *Maryland, supra,* at 382 (dissenting opinion).

As Justice Douglas has observed, any doctrine permitting warrantless administrative and licensing inspections, which does not also safeguard the self-protection interest, invites, ". . . a facile search, theoretically for things connected with . . ." the condition which the inspector seeks to correct but which will in fact be used to ". . . turn up evidence of crime," a possibility which will be well known to administrative inspectors and police alike, *Abel* v. *United States,* 362 U.S. 217, 253-4 (1960) (dissenting opinion).

Such a model should be unobjectionable to the Government since it has only urged that the warrantless intrusion was necessary to further the needs of a particular administrative agency in regulating a certain condition, i.e., the licensing of guns in the present case or the correction of unsanitary health conditions in *Frank, Camara* and *See.* It has never been urged that the warrantless inspection was necessary or justifiable to search for evidence of crime. Any further objection by the Government at this point necessarily undercuts the strength of its claim that the need for the inspection is to be balanced "merely" against the privacy interest involved.

It might be argued that once "on the premises" the inspector cannot be asked to shut his eyes to evidence of a crime found in "plain view." However, this argument

misses the point that the inspector is permitted warrantless entry on the strict pre-condition that nothing he finds during the inspection can be used to incriminate the inspectee. Once the inspector is on the premises and sees evidence of a crime, he cannot break the promise which gained him entry; when he suddenly shifts his role, under the claim of "plain view" and seizes evidence for incriminatory purposes, he breaks, so to speak, the very promise which he was required to make before gaining that view.

The remaining problem presented by this model is whether the inspector may seize illegal evidence, not for prosecutorial purposes, but for forfeiture. Such a seizure would appear permissible since it is only the later attempt to use what is seized as evidence to arrest and prosecute the inspectee which violates the self-protection interest. No one would urge, for example, that a health inspector must ignore a ticking explosive device found inside a building. Presumably, even without a warrant requirement, the inability of gaining convictions, combined with the still-existing requirement that warrantless administrative inspections be reasonable would combine to discourage wholesale use of pretext administrative searches aimed only at "contraband collection" by the authorities. This view is admittedly based on a narrow interpretation of self-protection and considers only the "deprivation of liberty," as distinguished from the "deprivation of property" considerations involved. A broader interpretation of the self-protection interest would perhaps require inspectors to remedy immediately dangerous conditions such as the explosive device in the above example but to leave contraband where they find it. Unless one of these two alternatives is adopted, the threat to self-protection becomes so

great as to make unacceptable the warrantless privacy intrusion.

Support for the model suggested can be found in legislative precedent safeguarding the self-protection, as distinguished from the privacy, interest of the citizen. Thus, as early as 1893, the Interstate Commerce Act was amended by the Compulsory Testimony Act to provide that no person would be excused on the grounds of self-incrimination from giving evidence in obedience to a subpoena from the Commission, but that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction . . . concerning which he may . . . produce evidence . . . in obedience to its subpoena." 27 Stat. 443 (1893), 49 U.S.C. §46 (1940).

This legislation was a response to the dictum of *Boyd* v. *United States,* 116 U.S. 616 (1886) which extended the "privacy interest" protection of the Fourth Amendment to ". . . any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods . . . " (at 630).[6] Enactment of such legislation has been described by one writer as a route of "escaping the effects of the *Boyd* dictum." Davis, *The Administrative Power of Investigation, supra,* at 1128. Thus, Congress recognized and safeguarded the citizen's self-protection against compulsory self-incrimination but at the same time permitted the needs of various administrative agencies to outweigh what was

[6] Sometime later, the Fourth Amendment privacy interest issue raised by *Boyd* was eliminated by this Court's ruling in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186, 195 (1946) that the administrative subpoena *duces tecum* involved "no question of actual search and seizure." (See also 327 U.S. 186 at 202.)

then recognized as the citizen's privacy interest in papers which he might be subpoenaed to produce.

More recently, in *Haynes v. United States,* 390 U.S. 85 (1968), this Court recognized the threat to self-protection created under the licensing provision of the National Firearms Act and held unconstitutional those portions of the Act requiring the self-incrimination. This in turn led to the 1968 Congressional Amendment to the National Firearms Act, 26 U.S.C. 5848(a), that "No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provisions of this chapter or regulations issued thereunder, shall . . . be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application, . . . containing the information or evidence."

The same result should occur under any administrative inspection program which has the potential for threatening a citizen's "self-protection" interest and any incursion into the privacy interests of the Fourth Amendment should not be permitted except under a holding which safeguards the self-protection interest.

Until the Congress enacts similar legislation safeguarding the self-protection interest threatened in the present case, this Court should hold unconstitutional the inspection provisions of 18 U.S.C. 923(g) and refuse to adopt a theory of administrative inspections which would permit convictions based on evidence found during such inspections. Assuming, *arguendo,* the licensee's privacy interest against warrantless inspections under 18 U.S.C. 923(g) is "out-

weighed" by the administrative needs involved, none of the demands of that administrative agency can ever justify elimination of the licensee's interest in self-protection.

IV.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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